Supreme Court, U.S.
FILED
JUL 17 2000
CLERK

(2)

No. 99-1836

IN THE

Supreme Court of the United States

BENITO T. PEREZ,

Petitioner,

v.

AETNA LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

JEFFERY V. STUCKEY
Counsel of Record
DICKINSON WRIGHT PLLC
215 S. Washington Square
Suite 200
Lansing, Michigan 48933-1812
(517) 487-4766

FRANCIS R. ORTIZ
K. SCOTT HAMILTON
DICKINSON WRIGHT PLLC
500 Woodward Avenue
Suite 4000
Detroit, Michigan 48226
(313) 223-3500

Attorneys for Respondent

160953

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

20 pp

STATEMENT PURSUANT TO RULE 29.6

Respondent, Aetna Life Insurance Company, is a wholly-owned subsidiary of Aetna Inc., which is publicly traded.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iv
Statement of the Case	1
A. Plaintiff's Claims and Their Disposition In The District Court.	1
B. Disposition By The Panel And *En Banc* Court on Appeal.	3
Reasons for Denying the Writ	5
I. The Petition For A Writ Of Certiorari Should Be Denied On The Merits.	5
A. The Sixth Circuit's Decision Does Not Conflict With *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989).	5
B. The Supreme Court Has Previously Denied Certiorari On The Identical Issue.	7

Contents

Page

C. The Sixth Circuit's Decision Does Not Conflict With Any Other Decision Of Another Court Of Appeals On The Same Important Matter. 7

D. The Present Case Is Not The Proper "Vehicle" For Resolving Any Conflict. 10

II. The Petition For Certiorari Must Be Denied Because It Is Untimely. 11

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

Block v. Pitney Bowes, Inc., 952 F.2d 1450 (D.C. Cir. 1992) 5

Cleary v. Knapp Shoes, Inc., 924 F. Supp. 309 (D. Mass. 1996) 8

Donato v. Metropolitan Life Ins. Co., 19 F.3d 375 (7th Cir. 1994) 9

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989) ... 5, 6

Hensley v. Fortis Benefits Ins. Co., 1999 U.S. Dist. LEXIS 17270 (W.D. Mich., Aug. 24, 1999) 8

Herzberger v. Standard Life Ins. Co., 205 F.3d 327 (7th Cir. 2000) 9

Johnson v. Eaton Corp., 970 F.2d 1569 (6th Cir. 1992) 5

Kearney v. Standard Life Ins. Co., 175 F.3d 1084 (9th Cir. 1999) 7, 9

Kinstler v. First Reliance Standard Life Ins. Co., 181 F.3d 243 (2d Cir. 1999) 9

Luby v. Teamsters Health, Welfare, and Pension Trust Funds, 944 F.2d 1176 (3d Cir. 1991) 9

Cited Authorities

	Page
Matton Steamboat Co. v. Murphy, 319 U.S. 412, 63 S. Ct. 1126, 87 L. Ed. 1483 (1943)	12
McBride v. Continental Cas. Co., 1999 U.S. Dist. LEXIS 6782 (E.D. Pa. May 11, 1999)	8
Pierre v. Continental Gen. Life Ins. Co., 502 U.S. 973, 112 S. Ct. 453, 116 L. Ed. 2d 470 (1991) ..	10
Pierre v. Connecticut Gen. Life Ins. Co., 932 F.2d 1552 (5th Cir. 1991)	9
Reinking v. Philadelphia American Life Ins. Co., 910 F.2d 1210 (4th Cir. 1990)	9
Standard Life Ins. Co. v. Kearney, 120 S. Ct. 389, 145 L. Ed. 2d 310, 68 U.S.L.W. 3289 (1999) ...	7
Starita v. Nycare Health Plans, Inc., 2000 U.S. Dist. LEXIS 3898 (E.D. Pa. March 29, 2000)	8
Yeager v. Reliance Standard Life Ins. Co., 88 F.3d 376 (6th Cir. 1996)	3, 4
Statutes:	
28 U.S.C. § 1254(1)	12
28 U.S.C. § 1257	12
28 U.S.C. § 1291	12

Cited Authorities

	Page
28 U.S.C. § 2101(c)	11
29 U.S.C. § 1132(a)(1)(B)	2
Rules:	
Sup. Ct. R. 10	6
Sup. Ct. R. 13.1	11
Sup. Ct. R. 13.3	11
Sup. Ct. R. 13.5	11
Other Authority:	
Wright & Miller, *Federal Practice and Procedure*, § 4036 (1988)	2

STATEMENT OF THE CASE

Sitting in *en banc* review of an earlier panel decision, the United States Court of Appeals for the Sixth Circuit held in its July 1, 1998 opinion that the specific language of an ERISA plan giving Respondent Aetna Life Insurance Company "the right to require as part of the proof of claim satisfactory evidence . . . that [the claimant] has furnished all required proofs for such benefits . . . ," gave Aetna discretion to determine whether claimants are entitled to benefits under the plan. Petitioner Benito T. Perez claims that a writ of certiorari is warranted to resolve a split between the Sixth Circuit and the United States Courts of Appeals for the Second and Ninth Circuits which held that similar plan language did not vest discretion.

A. Plaintiff's Claims and Their Disposition In The District Court.

Petitioner worked for 16 years for Motor Wheel Corporation, a division of Goodyear Tire and Rubber Company, in Lansing, Michigan (Appendix B at 10a). He fractured his left heel and ankle on the job in 1984 (Appendix E at 78a). As of December 1, 1985, Aetna determined that he was "totally disabled" under the ERISA-governed plan at issue, which defined "total disability" as being "unable, solely because of . . . accidental bodily injury . . . to work at any reasonable occupation" (Appendix B at 11a). "Reasonable occupation" is defined as "any gainful activity for which the employee is, or may reasonably become, fitted by education, training, or experience, and in which other people of similar background are actually employed as their principal means of support" (*Id.*).

In 1987, Petitioner, who had a General Education Development (GED) diploma, enrolled in Lansing Community College to get an associate's degree in business management, which he received in 1991. From 1985 through 1991, Aetna paid Petitioner benefits (Appendix B at 11a-12a).

Aetna informed Petitioner that benefits would end as of June 30, 1991, given the completion of his degree. In June 1991, Petitioner enrolled in a 12 week computer training course and requested that Aetna extend the disability benefits until he completed that training as well. Aetna declined his request, informing him that he had "acquired sufficient education and skills by virtue of [his] obtaining [his] Associate of Arts Degree in Business Management and [was] now able to pursue some reasonable occupation." Aetna paid no benefits after June, 1991 (Appendix B at 12a).

While receiving benefits from Aetna, Petitioner also received workers' disability compensation from the State of Michigan until December 5, 1992, when he became employed as a laboratory technician at the Laboratory of Clinical Medicine at Michigan State University (Appendix B at 14a). Petitioner quit after only one week and applied for reinstatement of his workers' compensation benefits. A workers' compensation magistrate denied his request in an administrative hearing, finding that Petitioner was able to perform — and did perform — the occupation of a laboratory technician (*Id.*).

Petitioner sued Aetna under 29 U.S.C. § 1132(a)(1)(B) to recover benefits (Appendix B at 15a). On cross-motions for summary judgment, Aetna argued that its decision was governed by the arbitrary and capricious standard of review because the plan states that "[Aetna] shall have the right to

require as part of the proof of claim satisfactory evidence . . . that [the claimant] has furnished all required proofs for such benefits . . . ." Aetna also argued that the Michigan workers' compensation administrative determination that Petitioner was able to engage in a reasonable occupation was collateral estoppel that precluded Petitioner from claiming that no reasonable occupation existed for which he was qualified.

The district court granted summary judgment for Aetna after determining that the standard of review did not matter, because even under a *de novo* standard Aetna's decision was correct (Appendix E at 83a).

B. Disposition By The Panel And *En Banc* Court on Appeal.

The original panel of the United States Court of Appeals for the Sixth Circuit reversed the district court's holding upon finding that the standard of review was dispositive, because in its view under a *de novo* standard of review Aetna's decision was not correct (Appendix D at 52a). The panel held in its September 23, 1996 opinion that the plan language did not explicitly say that the evidence of disability had to be satisfactory **to Aetna**, and therefore it did not clearly vest discretion in Aetna to make that determination (Appendix D at 65a-67a).

The Court of Appeals for the Sixth Circuit granted Aetna's petition for *en banc* review on the ground that the panel's September 23, 1996 opinion was in direct conflict with an earlier published Sixth Circuit opinion, *Yeager v. Reliance Standard Life Ins. Co.*, 88 F.3d 376 (6th Cir. 1996), which the panel in this case did not cite or acknowledge

(Appendix B at 10a). *Yeager* held that a plan vests discretion when it requires a claimant to submit "satisfactory evidence" of disability, regardless of whether it expressly says that the evidence must be satisfactory to the decision-maker.

The *en banc* Sixth Circuit court held in this case that the particular plan language at issue did vest discretion.[1] Noting that this Court has never suggested that " 'discretionary authority' hinges on incantation of the word 'discretion' or any other 'magic' word," courts under *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989), must "focus on the breadth of the administrator's power — their 'authority to determine eligibility for benefits or to construe the terms of the plan'." *Perez*, 150 F.3d at 555 (quoting *Firestone*, 489 U.S. at 115, 109 S. Ct. 948) (Appendix B at 18a). The *en banc* court thus correctly held that plan language which requires a claimant to submit "satisfactory proof" of disability gives discretion to the administrative decision-maker even if it does not specify that it must be satisfactory **to the decision-maker**, since the decision-maker to whom it is submitted is the only entity that could possibly make that determination (Appendix B at 17a-25a).

The *en banc* court remanded the case to the original panel with instructions to dispose of the appeal using the arbitrary and capricious standard (Appendix B at 25a). On February 10, 2000, the original panel affirmed the district court's determination that Aetna's decision was not arbitrary or capricious (Appendix A at 2a).

---

1. Like the original panel, the *en banc* court did not reach the collateral estoppel issue Aetna raised (Appendix B at 16a-17a).

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED ON THE MERITS.

A. The Sixth Circuit's Decision Does Not Conflict With *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989).

The courts of appeals have consistently stated that *Firestone Tire & Rubber Co. v. Bruch*, 498 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989), "did not suggest that 'discretionary authority' hinges on incantation of the word 'discretion' or any other 'magic word'." *Johnson v. Eaton Corp.*, 970 F.2d 1569, 1572 n.2 (6th Cir. 1992) (quoting *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1453 (D.C. Cir. 1992)). Instead, *Firestone* requires a court to "focus on the breadth of the administrator's power — their 'authority to determine eligibility for benefits or to construe the terms of the plan'." *Block, supra*, 952 F.2d at 1453 (quoting *Firestone*, 489 U.S. at 115, 109 S. Ct. at 948).

There is absolutely no inconsistency between the Sixth Circuit's decision in the present Petition and this Court's decision in *Firestone*. Indeed, *Firestone* **requires** that the administrator's "authority to determine eligibility for benefits" be the benchmark for deciding whether a plan vests discretion, not whether particular words are used. The Sixth Circuit held that Aetna had such authority in this case because the plan provided that eligibility for benefits would depend upon the claimant providing satisfactory evidence of disability. That holding is in perfect harmony with *Firestone*.

This Court in *Firestone* already has resolved the only issue of general importance in the field. In that case, this Court decided that under ERISA, the deferential "arbitrary and capricious" standard of review applies when the administrator of an insurance plan has "discretion" under a plan to interpret its terms or to apply them to specific insurance claims. Otherwise, the courts may review the decision *de novo*. This Court appropriately left it to the lower courts to determine whether particular plans authorize the exercise of discretion about specific types of decisions.

The "conflict" petitioner urges in this case does not relate to any general principle of law. Rather, it involves merely the application of *Firestone* to the language of specific insurance contracts. These decisions are, therefore, inherently fact bound and involve the type of issue that this Court "rarely" reviews. *See* Sup. Ct. R. 10 (noting that a petition for certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). There is no compelling reason for this Court to determine how much discretion particular phrases in particular companies' insurance contracts give to plan administrators in addressing particular types of claims.

Moreover, to the extent that some circuits may require clearer language about the existence and scope of the plan administrator's discretion, this issue can and should be resolved through changes in the text of insurance contracts. It is hardly necessary for this Court to intervene to superintend the details of contract drafting.

B. The Supreme Court Has Previously Denied Certiorari On The Identical Issue.

This Court has previously denied review of the identical issue Petitioner now raises. On November 1, 1999, this Court unanimously denied a writ of certiorari to the Court of Appeals for the Ninth Circuit in *Standard Insur. Co. v. Kearney*, 120 S. Ct. 389, 145 L. Ed. 2d 310, 68 U.S.L.W. 3289 (1999). The Ninth Circuit held, *en banc*, that plan language requiring "satisfactory written proof" of disability did not vest discretion. *Kearney*, 175 F.3d at 1089-90. In doing so, it expressly disagreed with the Sixth Circuit's *en banc* decision in *Perez*, *id.* at 1089, which is the subject of the present Petition.

This Court denied certiorari in *Kearney*, which was argued to be in conflict with *Perez*, which is the subject of the present Petition. The present Petition is the mirror-image, and presents the same issue of which this Court denied review in *Kearney*. Having previously determined that the issue did not warrant review, the Court should similarly deny review in this case.

C. The Sixth Circuit's Decision Does Not Conflict With Any Other Decision Of Another Court Of Appeals On The Same Important Matter.

The present case, and those decisions which Petitioner argues are in conflict with it, do not involve an "important matter" worthy of review. The decisions deal with the narrow and specific terms of particular ERISA plans and policies, and do not involve any broad principle of law. They instead focus on the narrow question of whether the particular phrase "satisfactory evidence" or "satisfactory proof" vests

discretion. Resolution of that question by this Court would have absolutely no application beyond those particular plan terms, and resolving it does not entail any broad or important legal issues under ERISA.

In attempting to broaden the significance of the issue raised in this case, Petitioner asserts that "[n]o policy authorized by any insurer would state that benefits will be paid upon the receipt 'of evidence'," and that "[e]very policy includes some qualifier suggesting a quantum or quality of the evidence required" (Petition at 10-11). That bald, unsupported assertion is demonstrably false. Insurance policies and welfare benefit plans often lack qualifiers regarding the quantum or quality of evidence. Numerous courts have considered, and found wanting, plan language that does not contain such qualifying statements of the kind of proof a claimant must provide in making a claim for benefits. *See, e.g.*, *Cleary v. Knapp Shoes, Inc.*, 924 F. Supp. 309 (D. Mass. 1996) (no discretion where plan simply said claimant must submit proof of loss for benefits); *Starita v. Nycare Health Plans, Inc.*, 2000 U.S. Dist. LEXIS 3898 *6 (E.D. Pa. March 29, 2000) (plan provided benefits "[w]hen proof is received by the Insurance Company that an insured employee is totally disabled"); *Hensley v. Fortis Benefits Ins. Co.*, 1999 U.S. Dist. LEXIS 17270 *14 (W.D. Mich., Aug. 24, 1999) ("the language in this case does not use the word 'satisfactory' or a similar word," but rather "the language in the [p]olicy speaks in terms of the claimant's duty to furnish evidence"); *McBride v. Continental Cas. Co.*, 1999 U.S. Dist. LEXIS 6782 *12 (E.D. Pa. May 11, 1999) ("[t]here is no requirement of 'satisfactory proof,' 'due proof' or anything similar in the section explaining what information a claimant must submit").

Second, Petitioner greatly overstates the significance of the Sixth Circuit's *en banc* decision, proclaiming that "[t]he decision affects the manner of review of millions of plans, policies, and benefit programs" (Petition at 16). To the contrary, the decision narrowly deals only with whether the particular phrase "satisfactory proof" or "satisfactory evidence" gives discretion to a plan administrator.

Indeed, the cases upon which Petitioner relies in arguing that other circuit courts of appeal have reached a different conclusion than the Sixth Circuit in *Perez* all involve a single insurer, the Standard Life Insurance Company or its successor, First Reliance Standard Life Insurance Company. *See Kearney v. Standard Life Ins. Co.*, 175 F.3d 1084 (9th Cir. 1999); *Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243 (2d Cir. 1999); *Herzberger v. Standard Life Ins. Co.*, 205 F.3d 327 (7th Cir. 2000).[2]

This Court has denied certiorari to review even more fundamental issues regarding the standard of review for ERISA plans, such as the split among the circuits concerning whether the *de novo* standard of review applies to all issues regarding the denial of benefits or only to issues regarding plan interpretation. *Compare Luby v. Teamsters Health, Welfare, and Pension Trust Funds*, 944 F.2d 1176, 1183-84 (3d Cir. 1991); *Reinking v. Philadelphia American Life Ins. Co.*, 910 F.2d 1210, 1213-14 (4th Cir. 1990); *Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375, 379 n.2 (7th Cir. 1994) (all holding that *de novo* standard applies to all issues when ERISA claim denial is challenged, including fact questions) *with Pierre v. Connecticut Gen. Life Ins. Co.*, 932 F.2d 1552 (5th Cir. 1991) (holding that *de novo* standard

---

2. Petitioner did not cite *Herzberger* in his Petition.

only applies to plan interpretation, while arbitrary and capricious standard applies to fact determinations).

Despite the split among the courts of appeal regarding that fundamental issue of the standard of review — which issue would affect every ERISA plan regardless of its terms — this Court denied certiorari to resolve the split. *Pierre v. Continental Gen. Life Ins. Co.*, 502 U.S. 973, 112 S. Ct. 453, 116 L. Ed. 2d 470 (1991).

The present Petition involves a much narrower and more confined issue having to do with the specific words of a plan, the resolution of which would have only modest impact. The issue is, by this Court's standards, not important enough to resolve through a writ of certiorari.

D. The Present Case Is Not The Proper "Vehicle" For Resolving Any Conflict.

The petition for certiorari should not be granted because the resolution of the standard of review issue would not entitle Petitioner to judgment. Aetna argued in the district court and court of appeals that collateral estoppel precluded Petitioner from asserting that no occupation exists for which he is qualified, since the Michigan workers' compensation magistrate determined in an administrative hearing that Petitioner was in fact employed and employable. The district court did not reach that issue, nor did the court of appeals sitting *en banc* (Appendix B at 16a-17a). Thus, even if this Court were to grant certiorari and reverse, it would at most result in remand to consider the independent state law defense of collateral estoppel. The presence of that defense makes the present case an improper vehicle for addressing the "conflict" that Petitioner urges.

II.

THE PETITION FOR CERTIORARI MUST BE DENIED BECAUSE IT IS UNTIMELY.

Petitioner seeks review of the United States Court of Appeals for the Sixth Circuit's *en banc* opinion of July 1, 1998, 150 F.3d 550 (6th Cir. 1998), which held that the particular plan language at issue vested discretion to the administrator, thereby invoking the arbitrary and capricious standard of review. Perez's Petition for Certiorari had to have been filed within ninety days of that opinion. It was not filed until May, 2000, or approximately two years after the opinion for which review is sought. The Petition for Certiorari must therefore be denied.

Rule 13.3 of the Rules of the Supreme Court of the United States provides that "[t]he time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed . . . ." Rule 13.1 provides that "a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by . . . United States court of appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment."[3]

28 U.S.C. § 2101(c) requires that a party file a petition for certiorari within 90 days of entry of the judgment or decree for which review is sought. The purpose of this and similar timing provisions for appeals is to "set a definite

---

3. Rule 13.5 permits a party to file, and a Justice to grant, a 60 day extension. Perez made no such application and, of course, even if he had and one had been granted, his Petition would have been due not later than December, 1999.

point of time when litigation shall be at an end . . . ." *See Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 63 S. Ct. 1126, 87 L. Ed. 1483 (1943). Although appeals are typically taken from final orders, 28 U.S.C. § 1254(1) eliminates the finality requirement for cases pending in the United States Court of Appeals. *See* Wright & Miller, *Federal Practice and Procedure*, § 4036 (1988) ("there is no requirement that there be a final decision; once a case has come to be in a court of appeals, the Supreme Court may grant certiorari to review interlocutory decisions or procedural rulings, and may grant review before the court of appeals has taken any action at all. Once review has been granted, moreover, the scope of the matters open for decision is approached entirely as a matter of wise judicial administration . . . ."); *Cf.* 28 U.S.C. §§ 1257 and 1291 (appeals from a state's highest court and from federal district courts must be from a final judgment).

Petitioner seeks review of a decision that was issued almost two years ago. The Petition is procedurally untimely and should be denied.

CONCLUSION

For all the reasons stated above, the Petition should be denied.

Respectfully submitted,

JEFFERY V. STUCKEY
Counsel of Record
DICKINSON WRIGHT PLLC
215 S. Washington Square
Suite 200
Lansing, Michigan 48933-1812
(517) 487-4766

FRANCIS R. ORTIZ
K. SCOTT HAMILTON
DICKINSON WRIGHT PLLC
500 Woodward Avenue
Suite 4000
Detroit, Michigan 48226
(313) 223-3500

Attorneys for Respondent